Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-670

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

PETITIONERS,

v.

CARLA ANDERSON HILLS, Secretary Department of Housing and Urban Development, et al,

RESPONDENTS.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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"In Praise of Simplicity,"
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APPENDIX A

Judgment Dismissing Action
[Filed May 28, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, a Limited Partnership,

Plaintiff,

v.

CARLA ANDERSON HILLS, Secretary of Housing and Urban Development of the United States; JAMES T. LYNN, Director, Office of Management and Budget of the United States; WILLIAM G. MILLIKEN, Governor of the State of Michigan; JOHN DEMPSEY, Chairman, Michigan State Housing Development Authority; FRANK J. KELLEY, Attorney General of the State of Michigan; DAVID L. FROH, Executive Director, Michigan State Housing Development Authority; CITIZENS MORTGAGE CORPORATION, a Michigan corporation; CITIZENS MORTGAGE CORPORATION, a Delaware corporation; MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, a public body corporate and politic of the State of Michigan; NEW DETROIT , INC., a Michigan nonprofit corporation; METROPOLITAN DETROIT CITIZENS DEVELOPMENT AUTHORITY, a Michigan nonprofit corporation; MANUFACTURERS HANOVER CORPORATION, a Delaware corporation;

LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation; CONTINENTAL WINGATE COMPANY, INCORPORATED, a Delaware corporation; THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, a Department of the Executive Branch of the United States; FEDERAL HOUSING ADMINISTRATION, an agency of the Department of Housing and Urban Development; WILLIAM E. SIMON, Secretary of Treasury of the United States, and DOES 1 through 25, Inclusive, jointly and severally,

Defendants.

JUDGMENT DISMISSING ACTION

For the reasons stated in the Court's Opinion and Order entered and filed this date, defendants Motion to Dismiss is GRANTED and Counts I, III, V, VI, VII, VIII, IX, X, XI, and XII are DISMISSED WITH PREJUDICE. Counts II, XIII, and XIV are DISMISSED WITHOUT PREJUDICE, and Count IV is DISMISSED WITH PREJUDICE insofar as it attempts to state a claim under the Civil Rights Act of 1867 and DISMISSED

WITHOUT PREJUDICE as to the allegation of a third-party beneficiary contract.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy

United States District Judge

Dated: May 28, 1975
Detroit, Michigan

A True Copy

HENRY R. HANSSEN,
Clerk

By /s/ _____
Deputy Clerk

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

[Filed May 28, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The plaintiffs in the instant action seek wide-ranging declaratory and injunctive relief, as well as money damages, alleging multiple and widespread violations by defendants of plaintiffs' rights under the Fifth, Ninth, Thirteenth and Fourteenth Amendments and Articles I and II of the Constitution of the United States, various national housing acts and community or metropolitan development acts, §§ 1980, 1981, 1982, 1983, 1985, and 1988 of Title 42, United States Code; Title 7 of the 1964 Civil Rights Act, and numerous other statutes.

Defendants MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY (MSHDA) and CITIZENS filed a motion to dismiss the complaint and in the alternative for summary Judgment. Plaintiffs requestd

discovery before any determination was made on the request for summary judgment. The Court directed that initial consideration be given only to the motion to dismiss. Hearing was noticed for Tuesday, May 27, 1975. On that date plaintiffs filed the first amended complaint. Defendants MSHDA and CITIZENS urge that the grounds stated in their motion to dismiss apply equally to the allegations of the first amended complaint.

Plaintiffs are entitled as a matter of right to file an amended complaint in this action and the Court has granted leave to add the additional parties-plaintiff if such leave is required (only plaintiff SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION was named as plaintiff in the original

complaint). The grounds stated in the motion to dismiss are considered as directed against well-pleaded allegations of the first amended complaint.

Plaintiff SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION (SECOND AVENUE) alleges that it is a limited partnership, owned, controlled, and managed by black persons and that it was organized for the purpose of acquiring, rehabilitating, and developing certain apartment houses on Second Avenue and Hendrie Street in the City of Detroit, to provide housing facilities to persons of low and moderate income and that financing of this project was to be accomplished with the assistance of a mortgage commitment loan from MSHDA and a loan from defendant CITIZENS MORTGAGE CORPORATION

(a Michigan corporation) secured by a mortgage on the property and insured by the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) under § 236 of the National Housing Act. It further alleges that it received such mortgage commitment loan and mortgage and further that the defendants, CITIZENS-Michigan and MSHDA, are foreclosing the mortgage in an action pending in the Wayne County Circuit Court, State of Michigan.

Plaintiffs allege that plaintiff NICHOLAS HOOD is a general partner of SECOND AVENUE, that he is a state and federal taxpayer, that he is a black person, and that he brings this action "derivatively in the right and for the benefit of SECOND AVENUE."

Plaintiffs allege that plaintiff

FRED L. ELEY is a black person who resided in one of the apartments being rehabilitated by SECOND AVENUE and "was relocated from one of the buildings of the SECOND-Hendrie Project, and since that time has been on a preference waiting list to relocate back to the Second-Hendrie Project, if and when same is completed." The first amended complaint further alleges that MR. ELEY received his primary income "from Social Security Programs of Federal public assistance programs." The first amended complaint further alleges that Mr. ELEY brings this action on behalf of ". . . all prospective qualified tenants or applicants similarly situated under HUD's Project Rehab Program or any other present or future federally or state assisted low or moderate income

housing projects or housing developments in the City of Detroit, Michigan." The first amended complaint further alleges that the members of the class on whose behalf plaintiff ELEY sues "desire to enjoy and enforce their right to a decent, safe, sanitary and suitable living environment and housing in the City of Detroit; their right to live near their present jobs; their right to have their children continue their education in the City of Detroit school system."

The first amended complaint further alleges that plaintiff U. H. CONSTRUCTION COMPANY, INC. (U.H.) is a corporation which acted as general contractor for SECOND AVENUE's project and that it devoted considerable sums of money and time in developing said

project and that it has paid state and federal taxes.

The first amended complaint further alleges that plaintiff CLARENCE C. WHITE was the principal shareholder and president of U.H.; that he is a black person and citizen of the State of Michigan, and files federal and state income tax returns; and that he brings this action individually and as a representative "of all persons interested in or affected by the issuance of the public securities by Defendant MSHDA."

The first amended complaint alleges that the defendant MSHDA is a public body corporate and politic of the State of Michigan, and that public low or moderate income housing facilities and programs in the State of Michigan are

under the jurisdiction, administration, management and control of MSHDA.

The first amended complaint alleges in ¶ 4(e) that MSHDA receives its funds through

> federally aided mortgage subsidy payments or federal tax benefits insurance under existing HUD, FHA or VA mortgage assistance or insurance programs or activities under § 203, 221(d)(2), 235 or 236 of the National Housing Act, § 101 of the Housing and Urban Development Act of 1965 and § 501 of the Serviceman's Readjustment Act of 1944. Also, MSHDA receives financial assistance or subsidy from the United States and the State of Michigan or any of its political subdivisions or otherwise through federal, state, county and city tax exclusions or benefits or exemptions pursuant to the Internal Revenue Code of 1954 as amended and the state, county and city tax laws.

The identities of most of the other defendants are described in the title of the first amended complaint and will not be repeated here.

Plaintiffs' first amended complaint fails, as did SECOND AVENUE's original complaint, to contain a short and plain statement of plaintiffs' various claims showing that they are entitled to relief. However, since defendants assert that a prompt resolution of certain issues is critical to MSHDA's ability to sell its Bonds and the allegations can, with careful attention, be sorted and the possible claims plaintiffs are asserting can be analysed, particularly with the aid of the authorities upon which plaintiffs rely in their brief, the Court will pass on the merits of the motion to dismiss.

Count I of the first amended complaint challenges MSHDA's entire program on the grounds, among others, that it is racially discriminatory as

applied in that its effect and purpose is to keep black residents in the black neighborhoods in the central part of the City of Detroit, and prevent them from moving to white neighborhoods. No plaintiff in this action has standing to raise this challenge. Plaintiffs SECOND AVENUE and U.H. are business entities. Plaintiff HOOD sues only in his representative capacity. Plaintiff WHITE does not allege that he as an individual is being denied the right to live outside the central city. The same is true of plaintiff ELEY, who indeed alleges that he wishes to remain in the central city and specifically in the Second-Hendrie project. It is well settled that plaintiffs cannot rely for standing upon alleged violations of the civil rights of others. Brown v. Board of Trustees, 187 F.2d

20 (5th Cir. 1951). Only persons actually deprived of their civil rights can sue to redress such rights. Bailey v. Patterson, 369 U. S. 31 (1962).

The courts depart from the general rule only in unique situations. For example, where fundamental rights would otherwise be denied and the possessor of the right would have no adequate remedy, Truax v. Raich, 239 U. S. 33 (1915), or where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." Barrows v. Jackson, 346 U. S. 249, 257 (1953).

The other allegations of Count I which allege that defendants are engaged in a variety of practices designed to produce and in fact resulting in discrimination in

housing on the basis of race, are all subject to the same infirmity.

None of the plaintiffs allege any facts which would constitute discrimination against them on the basis of race, even if a limited partnership can be viewed as having a racial character.

Count I also alleges various misrepresentations by MSHDA and HUD as to what their programs would encompass and what they would accomplish. Plaintiffs fail, however, to allege in what way they have been harmed thereby. Further, plaintiffs allege that only a small portion of MSHDA's funds have benefited black sponsors. However, since plaintiffs are among the black sponsors so benefited, they likewise lack standing to complain in this regard.

Plaintiffs also allege in Count I that SECOND AVENUE and U.H. were required by their agreement with the MSHDA and HUD to use members of the Allied Trade Union (Local No. 124) in rehabilitating the three buildings but fail to state in what way this violated plaintiff's rights.

Numerous allegations are made in Count I with respect to the failure of defendant METROPOLITAN DETROIT CITIZENS DEVELOPMENT AUTHORITY (MDCDA), a Michigan non-profit corporation created under the auspices of NEW DETROIT, INC., to fulfill its obligations under the MSHDA-HUD program to render referral assistance to families required to relocate during rehabilitation. How However, the first amended complaint is silent as to whether Mr. ELEY required such assistance or was denied

Procedure Act. See Mattingly v. Elias, 325 F. Supp. 1374 (E.D. Pa. 1971).

Count I also alleges violation Titles 7 and 8 of the Civil Rights Act of 1968. It is clear, however, that none of the plaintiffs are aggrieved persons under Title 8 and further that the procedures required under that title have not been followd by any of the plaintiffs. Further, Title 8 prohibits discrimination in the terms or conditions under which housing is rented or sold. There is no specific allegation of any such discrimination as to any rental unit alleged here. Nor, are plaintiffs entitled to any relief under Title 7. First, there is no allegation that plaintiffs are employed by defendants or sought employment with them, and, second, the MSHDA,

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such assistance.

Further allegations in Count I allege violations by defendants of various national and state housing acts. See ¶ 1(a) of Count I for a complete list of these statutes. None of these statutes provide a direct, private remedy to plaintiffs. Courts have been very reluctant to imply a private cause of action, particularly against governmental agencies, for alleged violations of duties imposed by the Housing Acts. See United States v. Neustadt, 366 U.S. 696 (1961); Jackson v. Romney, 355 F.Supp. 737 (D.D.C. 1973). Plaintiffs here do not have the standing of the plaintiff in Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975), where plaintiff's standing existed under the Administrative

as an agency of the state, and the other defendants who are appointees of the state or elected officials, are exempt under 2000 e(b)(1).

Count II of the first amended complaint seeks injunctive relief to prevent the foreclosure of the mortgages on SECOND AVENUE's property for the same reasons stated in Count I of the first amended complaint and for the further reason that it is alleged certain defendants agreed to forbear to exercise the right to foreclose. To the extent that plaintiffs allege an agreement to forbear, that claim is here only on a pendant jurisdiction basis. This Count seeks to enjoin the state foreclosure proceedings without any showing that the claims raised here cannot be fully litigated in the pending

state action. Absent that showing, this Court should not enjoin the state court proceedings.

Count III, more specifically, alleges a violation of 42 United States Code, 2000d which is Title 6, § 601 of the Civil Rights Act of 1964. Once again, none of the plaintiffs here are persons who themselves are alleged to suffer injury under that section and, therefore, lack standing.

Count IV directs its allegations more specifically to the Civil Rights Act of 1867, 42 U.S.C. 1981, et seq. Certain of the defendants, such as MSHDA, are not liable under 1983, since they are not persons. However, there are defendants who are individuals and who are not exempt from these statutes. Plaintiff SECOND

AVENUE as a limited partnership, has no racial identity and cannot be discriminated against on the basis of race. Plaintiff NICHOLAS HOOD sues only in a representative capacity on behalf of the partnership (see ¶ 1(e) of Count I). Plaintiff CLARENCE WHITE, although he sues individually, alleges no discrimination against himself as an individual. U.H. is a corporation and, likewise, cannot be discriminated against on the basis of race. Plaintiff ELEY fails to allege any discrimination against himself on the basis of race or any cognizable civil rights.

Count IV also alleges a third party beneficiary contract under M.S.A., § 27A.1405. Any claim under that section can only be brought in this Court on a pendant jurisdiction basis.

Count V alleges in detail the relocation assistance requirements developed by HUD. It alleges that defendants, NEW DETROIT, INC. and MDCDA, contracted to carry out the said program and have failed to do so. However, the first amended complaint is totally silent as to any plaintiff who has been in any way adversely affected thereby. Although it is alleged that Mr. ELEY previously resided in the Second-Hendrie property, there is no allegation, as the Court stated previously in its discussion of Count I, that Mr. ELEY required such assistance, was denied such assistance, or suffered any injury of any kind. In view of the total lack of such allegations Mr. ELEY cannot represent the class described in Count V. Further, since

one remedy sought by the other plaintiffs, the termination of the entire program of rehabilitation of buildings in the central city, is contrary to the interest of the class MR. ELEY is alleged to represent, that class cannot properly be represented in this action.

In Counts VI and VII, plaintiffs seek injunctive relief to prohibit defendant WILLIAM E. SIMON, Secretary of the United States Treasury, from granting tax exempt status, tax exclusions and deductions and conferring other tax benefits to defendant MSHDA. Plaintiffs assert that the granting of these tax benefits constitute federal assistance for racially segregatory purposes in violation of Title VI of

the Civil Rights Act of 1964, 42 U.S.C. § 2000d,and denies them equal protection of the laws.

Plaintiffs seek standing to contest the validity of defendants' rulings as taxpayers whose tax burdens are increased by the SECRETARY's actions. In Flast v. Cohen, 392 U.S. 83 (1968), the Court established that status as a taxpayer can, under limited circumstances, supply the personal stake essential to standing. There, the Court held that to ensure the necessary personal stake there must be "a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." 392 U. S. at 102. The Court found a logical nexus where the taxpayer challenged the exercise of "congres-

sional power under the taxing and spending clause of Act. 1 § 8." Ibid.

Plaintiffs here do not challenge the Congressional enactment under Article I, § 8, but, rather, actions of the Executive Branch in implementing that enactment. As such, plaintiffs have failed to satisfy the second part of the Flast nexus test. Schlesinger v. Reservists to Stop the War, 418 U. S. 208 (1973).

Count VIII alleges that the bonds which MSHDA issues are illegal under state law in that they are not "self liquidating revenue bonds." It should be noted that this allegation would not be within the federal Court's jurisdiction unless it is pendant to some federal claim.

The essence of this argument is that

the bonds issued by the Authority are not "self-liquidating: "in that it is not contemplated that they will be paid off exclusively from the repayments of loans made by the Authority. In particular, the objection is that the proceeds of federal mortgage insurance may be used to pay off the bonds.

However, the statute creating the Authority permits the Authority to use any of its funds, presumably including funds it may acquire pursuant to a contract with the federal government, to repay the bonded indebtedness. MSA § 16.144(25):

> (3) Except as may otherwise be expressly provided by the authority, every issue of its notes or bonds shall be general obligations of the authority payable out of any revenues or moneys of the authority,

> subject only to any agreements with the holders of particular notes or bonds pledging any particular receipts or revenues.

There are many references to federal programs throughout the Act creating the Authority, which clearly indicates that the legislature intended the Authority to participate in such programs. See Advisory Opinion re Constitutionality of PA 1966, No. 346, 380 Mich. 554, 578 (1968). There are further allegations that MSHDA is mismanaged but such allegations do not give a cause of action to plaintiffs.

In Count IX, plaintiffs allege that the issuance of the Authority's bonds violates the provisions of various statutes regulating securities. At oral argument plaintiffs conceded that the amended complaint does not charge

a violation of any securities statutes requiring registration. Indeed, as defendants point out, the securities of states, political subdivisions of states, and public instrumentalities of states are exempt from registration requirements. See 15 U.S.C. § 77c(a)(2) (Securities Act of 1933); 15 U.S.C. § 78c(a)(12)(Securities Exchange Act of 1934);MSA, § 19.776(402)(a)(1) (Uniform Securities Act).

Instead, plaintiffs rely on the anti-fraud provision of the various securities statutes: 15 U.S.C.§§ 77l, 77q, 78j; MSA, § 19.887(410)(a)(2). However, plaintiffs lack standing to sue under these provisions. Federal cases clearly establish that for violations of the anti-fraud provisions of either the 1933 or 1934 Acts, only

purchasers and sellers may maintain civil actions. See, e.g., Greater Iowa Corp. v. McLendon, 378 F.2d 783, 788-90 (8th Cir. 1967) (under 1933 Act, only "purchasers" of securities can sue under 15 U.S.C. § 77l, which is the section that creates a civil remedy for violations of 15 U.S.C. § 77q); Simmons v. Wolfson, 428 F.2d 455, 456 (6th Cir. 1970) cert. denied, 400 U. S. 999 (1971) ("It has long been settled that only purchasers or sellers of securities may invoke the provisions of § 10(b) of the 1934 Act or Rule 10b-5 of the Commission"). The Uniform Securities Act, as adopted in Michigan, expressly limits the class of plaintiffs:

> Any person who:
>
> . . .

> (2) Offers or sells a security by means of any untrue statement of a material fact . . .
>
> Is liable to the person buying the security from him . . .

MSA § 19.776(410)(a).

Plaintiffs also claim that there is standing under another state law doctrine, citing the Public Securities' Validation Act, MSA, § 27A.2942, and Alan v. Wayne County, 388 Mich. 210 (1972). The Public Securities Validation Act does not create a right to sue to prevent issuance of bonds. Rather, it establishes a set of procedures to be followed, "If an action contesting the validity is brought against any public body." MSA §27A.2942 (1). Even the procedures, which appear to be created to permit public bodies

to resolve all questions relating to their bonds in a single action, imply that only parties with interests in the securities are proper parties. It provides that the public body may, if sued, file a third party complaint against "persons interested in or affected by the issuance of the securities." Thus, the Act does not specifically answer the question of whether these plaintiffs have such an interest in these bonds as to permit them to challenge the sale.

The statutory scheme under which the suit in Alan v. Wayne County, 388 Mich. 210 (1972), arose is far different from that presented here. Plaintiffs place heavy reliance on the Michigan Supreme Court's requirement of specified notice to the public prior to

the issuance of the bonds and argues that the plaintiffs should be able to raise similar challenges to the various statements issued by MSHDA. However, the Alan case arose in the context of a statutory scheme that required a referendum if a specified number of signatures were obtained within 30 days of the publication of a "Notice of Intent to Issue Bonds." The Court's conclusions are premised on the notion that due process requires that this right to a referendum not be subverted by a confusing or misleading notice of intent to issue bonds: "To comport with due process any notice respecting petition rights on bonds supported by any pledge of tax power must state to whom the notice is issued and for what purpose . . .." 388 Mich.

at 352. Unlike the provisions of the Act involved in Alan (MSA, § 5.2763), the authority of MSHDA to issue bonds does not provide for such notice or referenda. See MSA, § 16.144(25).

In addition, as indicated by the language quoted above from Alan, of critical importance to that decision was the fact that the bonds involved were backed by the taxing power, providing the sort of "interest" apparently contemplated by the Michigan legislature in the Validation of Public Securities Act, supra. And the Michigan Supreme Court has unequivocally decided that MSHDA bonds are not backed by the taxing power of the state. Advisory Opinion re: Constitutionality of PA 346 of 1966, 380 Mich 554 (1968).

Count X merely seeks damages for the same wrongs discussed in Count IX. It, too, therefore, fails to state a claim upon which relief can be granted.

Count XI alleges that defendants conspired to deprive plaintiffs of their civil and constitutional rights by filing an action in the state court to foreclose the mortgages on the Second-Hendrie property.

The institution of such an action does not constitute a deprivation of plaintiffs' civil rights. The remaining allegations of the count are vague and conclusionary. To the extent that the allegations state that obligations are required by the sponsor in the agreement relating to the Second-Hendrie properties that were not required in other agreements and that

this constituted a conspiracy against SECOND AVENUE, it should be noted that Urban Housing and Planning Associates, Inc. and not SECOND AVENUE was original sponsor of the project.

In Count XII, plaintiffs allege that the defendants have conspired to damage plaintiffs' businesses in violation of § 1 of the Sherman Act. 15 U.S.C. § 1. It is well established that governmental agencies and officers do not fall within the purview of the antitrust laws, Parker v. Brown, 317 U. S. 341(1943); Alabama Power Co. v. Alabama Electric Cooperative, Inc. 394 F.2d 672 (5th Cir. 1968). This immunity is not removed by charging a conspiracy between governmental and private parties. Saenz v. University Interscholastic League, 487 F.2d 1026

(5th Cir. 1973). Although there are five private party-defendants listed in the caption of this action, there are no allegations of any acts by any of the private individuals which are in restraint of trade. Further, plaintiffs allege elsewhere in the complaint that it is the obligation of the governmental agencies and officers to perform the very acts which are alleged were to be in restraint of trade.

Plaintiffs also allege a violation of the Clayton Act but such allegation is inappropriate since no commodity is involved in the instant action.

Although motions to dismiss were filed on behalf of only some of the defendants, the basis for dismissal are also applicable to the non-moving

defendants. For the foregoing reasons, Counts I, III, IV (in part), V, VI, VII, VIII, IX, X, XI and XII are DISMISSED WITH PREJUDICE.

Counts II, IV (in part), XIII, XIV do not present federal question claims; rather plaintiffs seek resolution of state claims which are pendant to alleged federal question claims. Hurn v. Oursler, 289 U.S. 238 (1933). Pendant jurisdiction is, however, a doctrine of discretion, not of plaintiffs' right. Moynahan v. Pari-Mutual Employees Guild, 317 F.2d 209 (9th Cir. 1963). Where, as here, the federal claims are dismissed before trial, even though they are not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. United Mine Workers of America

v. Gibbs, 383, U.S. 715 (1966). These counts are DISMISSED WITHOUT PREJUDICE.

Defendants in the motion to dismiss and in oral argument requested that the Court not permit plaintiffs to amend the allegation of their complaint. See 3 Moore's Federal Practice, ¶ 15.10 In view of the fact that plaintiffs have, after receiving the motion to dismiss, filed an amended complaint, the dismissal is without leave to amend.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: May 28, 1975
Detroit, Michigan

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DENYING PLAINTIFF'S SUPPLEMENTAL ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT DISMISSING ACTION

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER DENYING PLAINTIFFS'SUPPLEMENTAL ALTERNATIVE MOTION TO ALTER OR AMEND JUDGMENT DISMISSING ACTION

Plaintiffs on June 9, 1975, filed motions entitled: "Motion to Alter or Amend and Vacate Judgment Dismissing Action"; "Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended Complaint".

On June 10, 1975, the instant motion was filed. It requests substantially the same relief sought in the previous three June 9, 1975 motions although the request is couched in different language.

The motion is DENIED for the reason stated in the Court's Opinion and order denying the June 9, 1975 motions.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District
Judge

Dated: June 12, 1975

A True Copy

HENRY R. HANSSEN,
Clerk

By /s/_____
Deputy Clerk

OPINION AND ORDER OF UNITED STATES DISTRICT COURT

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

OPINION AND ORDER
DENYING MOTION TO ALTER OR AMEND AND VACATE JUDGMENT DISMISSING ACTION; ALTERNATIVE MOTION TO RECONSIDER AND GRANT A NEW HEARING AND TO ALTER AND AMEND THE JUDGMENT IN THE FAVOR OF PLAINTIFFS;AND ALTERNATIVE MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

Plaintiffs have filed motions entitled: "Motions to Alter or Amend and Vacate Judgment Dismissing Action"; "Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended

Complaint." All three motions are in fact motions for reconsideration or rehearing. The motions present the same issues ruled upon by the Court in its Opinion and Order Granting Defendants' Motion to Dismiss (entered and filed on May 28, 1975). The brief in support of the motion directs considerable attention to the Court's refusal to permit a second amended complaint. The motions do not set forth any new matter which plaintiffs could now allege. Rather, plaintiffs state their wishes to clarify previous allegations. As the Court stated in its Opinion, the complaint did not contain a short and plain statement of plaintiffs' claims; however, the Court believes it fully understood plaintiffs' claims and theories.

Further, plaintiffs' counsel presented more than two hours of oral argument on the sufficiency of the complaint.

For the foregoing reasons the Motion to Alter or Amend and Vacate Judgment Dismissing Action, the Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs, and the Alternative Motion for Leave to Amend First Amended Complaint are DENIED.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: June 12, 1975
Detroit, Michigan

A True Copy
HENRY R. HANSSEN,
Clerk

By /s/_____
Deputy Clerk

OPINION AND ORDER OF UNITED STATES DISTRICT COURT

[Filed June 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Title Omitted in Printing]

ORDER DENYING
APPLICATION TO ENLARGE TIME TO FILE SUPPORTING DOCUMENTS AND BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND AND VACATE JUDGMENT DISMISSING ACTION; ALTERNATIVE MOTION TO RECONSIDER AND GRANT A NEW HEARING AND TO ALTER AND AMEND THE JUDGMENT IN THE FAVOR OF PLAINTIFFS; ALTERNATIVE MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

Plaintiffs have requested additional time to file supporting documents and a further brief in support of their motions: "Motion to Alter or Amend and Vacate Judgment Dismissing Action"; Alternative Motion to Reconsider and Grant a New Hearing and to Alter and

Amend the Judgment in the Favor of Plaintiffs"; and "Alternative Motion for Leave to Amend First Amended Complaint".

Extensive briefs have already been filed in this action. These motions are essentially motions for rehearing and raise no new issues. Plaintiffs presumably considered both the jurisdiction of the Court and the bases of their claims before filing this action. (Many of the same claims were set forth in the counter-claim filed in Civil Action No. 75-70332, since remanded to the Circuit Court for the County of Wayne). Plaintiffs have had adequate opportunity to brief the issues.

For the foregoing reasons, the Ex Parte Application to Enlarge Time

to File Supporting Documents and Brief in Support of Plaintiffs' Motion to Alter or Amend and Vacate Judgment Dismissing Action; Alternative Motion to Reconsider and Grant a New Hearing and to Alter and Amend the Judgment in the Favor of Plaintiffs; and Alternative Motion for Leave to Amend First Amended Complaint is DENIED.

/s/ Cornelia G. Kennedy
Cornelia G. Kennedy
United States District Judge

Dated: June 12, 1975
Detroit, Michigan

A True Copy

HENRY R. HANSSEN
Clerk

By /s/ _____
Deputy Clerk

APPENDIX B

ORDER of the United States Court of Appeals for the Sixth Circuit Affirming District Court Judgment

[Filed April 8, 1976]

No. 75-1966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, ET AL.

Plaintiffs-Appellants

v

ORDER

CARLA ANDERSON HILLS, SECRETARY OF HUD, ET AL.

Defendants-Appellees

Before: WEICK and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

This appeal has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the

parties. The Court, being fully advised in the premises, concludes that the judgment of the trial court should be affirmed for the reasons set forth in the opinion filed by District Judge Cornelia G. Kennedy, and on the additional authority of Warth v. Seldin, ____ U.S. ____, 95 S.Ct. 2197 (June 25, 1975). Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John A. Hehman
Clerk

APPENDIX C

Order of the United States Court of Appeals for the Sixth Circuit Denying Second Avenue's Petition for Rehearing.

[Filed May 25, 1975]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

[Title Omitted in Printing]

Before: WEICK and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

Plaintiffs-appellants' position for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is

without merit,

IT IS ORDERED that the petition be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

U. S. Const. Amend. XIV §§ 1 and 5

> Section 1. All persons born or naturalized in the United states, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U. S. Const. Amend. V

> No person shall be
>
> ***
>
> deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

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5 U. S. C. § 702 (1966)

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

---

12 U. S. C. § 1702 (1967)

The powers conferred by this chapter shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this subchapter and

subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties and responsibilities. The Secretary may delegate any of the functions and powers conferred upon him under this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B of this chapter, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of

funds made available by this chapter: Provided, That notwithstanding any other provisions of law except provisions of law hereafter enacted expressly in limitation hereof, all expenses of the Department of Housing and Urban Development in connection with the examination and insurance of loans or investments under any subchapter of this chapter, all properly capitalized expenditures, and other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this chapter, except that, unless made pursuant to specific authorization by the Congress therefor, expenditures made in any fiscal year pursuant to this proviso, other than the payment of insurance claims and other than expenditures (including services on a contract or fee basis, but not including other personal services) in connection with the acquisition, protection, completion, operation, maintenance, improvement, or disposition of real or personal property of the Department acquired under authority of this chapter, shall not exceed 35 per centum

of the income received by the Department of Housing and Urban Development from premiums and carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, X, IX-A, and IX-B, of this chapter, be authorized in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

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15 U. S. C. § 1 (1955)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commo-

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dities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make unlawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall

be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

---

28 U. S. C. §1331 (1958).

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may

impose costs on the plaintiff.

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42 U. S. C. §1981 (1870)

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

---

42 U. S. C. §1982 (1866)

§1982. Property rights of citizens

All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

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42 U. S. C. §1983 (1871)

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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42 U. S. C. §2000d (1964)

§2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

assistance.

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42 U. S. C. §2000d-1 (1964)

§2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal Department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guanranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the

President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited in its effect to the particular program, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file

with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

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42 U. S. C. §2000d-2 (1964)

§2000d-2. Judicial review; Administrative Procedure Act

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such

action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

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42 U. S. C. §2000d-3 (1964)

§2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

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42 U. S. C. §2000d-4 (1964)

§2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respec t to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

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42 U. S. C. §2000d-5 (1968)

§2000d-5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged non-compliance with Civil Rights Act

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless

such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

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42 U. S. C. §3939 (1968)

§3939. Applicability of antitrust laws

Nothing contained herein shall affect the applicability of the Federal antitrust laws to the activities of the corporation and the partnership created under this chapter and of the persons participating therein or in partnerships, limited partnerships, or joint ventures with either of them.

Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings

***

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter.

***

(6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

EXHIBIT E

"'The current Supreme Court has made a mockery of the motion of direct and uncomplicated access to federal courts', say Arych Neier and Burt Neuborne", July/August, 1976, Juris Doctor, p. 34.

Supreme Court decisions have delivered severe blows to the public interest bar, shut off access to the federal courts, and restricted the ability of federal courts to grant meaningful remedies. Here is part of their testimony on access.

Since the Civil War, the federal trial courts have served as the primary enforcement arm of the Bill of Rights and Thirteenth, Fourteenth, and Fifteenth Amendments. While state courts retain a concurrent obligation to enforce the federal Constitution, it

has been the lesson of our history--and it remains the fixed belief of virutally every experienced civil rights lawyer in America--that federal courts provide the most effective forum within which to enforce the Constitution of the United States.

Congress has codified this judgment in the Civil Rights Act of 1871 (42 USC §1983), which guarantees a federal judicial forum whenever state or local officials interfere with federal constitutional or statutory rights. Unfortunately, the command of Congress has been severely weakened by the current Supreme Court.

First, in cases like Warth v. Seldin (1975) and Rizzo v. Goode (1976) a majority of the current Court has

restricted the class of persons who may complain to the federal courts about violations of their federal constitutional rights. In Warth, the Court ruled that minority residents of the Rochester area could not challenge suburban exclusionary zoning practices, which condemned them to a ghetto existence, because they were unable to point to a specific housing project which they would have resided in, but for the exclusionary zoning. Of course, the very existence of exclusionary zoning prevented the planning or construction of such projects--reducing the decision to a crude exercise in Catch-22. In Rizzo, the Court ruled that black citizens of Philadelphia, who had been the target of proven police abuse, could not seek

an order directing the mayor to establish a police complaint procedure, since they were not currently suffering any abuse at his hands. The extremely crabbed view of the standing enunciated in cases like Warth and Rizzo as a "prudential" matter by a majority of the Court leaves thousands of Americans with festering constitutional grievances, but without a federal court within which to resolve them in an orderly manner.

Second, in cases like Paul v. Davis (1976), the current Court has read the Civil Rights Act of 1871 in a grudging manner to refuse access to the federal courts to persons who have been seriously injuryed by lawless government action (see page 35).

Third, the current Court has dra-

matically expanded the doctrines of abstention and comity to force case after case out of federal court. Despite the ruling of Monroe v. Pape (1961) that civil rights plaintiffs are not obliged to exhaust state judicial remedies prior to seeking relief in federal court, the current Supreme Court has clamped a de facto state judicial exhaustion requirement on civil rights plaintiffs--imposing a delay of from one to two years before many civil rights plaintiffs may gain access to a federal forum.

The availability of expeditious federal relief from constitutional violations has been a critical factor in transforming abstract constitutional doctrine into practical reality. Accordingly, the draftsmen of the Civil

Rights Act of 1871 and eight members of the Supreme Court in Monroe v. Pape recognized that the delay which would be caused by requiring resort to state court as a pre-condition to federal judicial review would destroy 42 USC §1983 as an effective device for the protection of federal constitutional rights. Accordingly, it is now well settled that a civil rights plaintiff need not exhaust state judicial remedies before seeking federal judicial review under the Civil Rights Act of 1871. Unfortunately, however, the current Court has made a mockery of the notion of direct and uncomplicated access to federal courts by imposing at least three forms of state exhaustion on prospective civil rights plaintiffs.

First, in Preiser v. Rodriguez (1973), the current Court invented a species of cases falling within the term "core habeas corpus" in connection with which it imposed a requirement of exhaustion of state judicial remedies.

Second, in a series of cases exemplified by Boehning v. Indiana State Employees Association (1976), the current Court has dramatically broadened the concept of abstention into a virtual de facto exhaustion requirement. In the view of Chief Justice Burger, and perhaps a majority of the current Court, whevnever the challenged action of a state official might violate a state constitutional or statutory law, a civil rights plaintiff must seek relief in state court on

state law grounds, prior to seeking relief in federal court.

Finally, in the wake of Younger v. Harris (1971), which forbade federal judicial interference with pending state criminal proceedings, the current Court has ousted the federal courts from wide areas of constitutional adjudication in the guise of comity. In Huffman v. Pursue, Ltd. (1971), the Court declined to permit a federal court to enjoin an unconstitutional state civil court injunction. Thus, by the simple expedient of commencing a state civil proceeding against a potential federal civil rights plaintiff, state officials can now deprive that plaintiff of access to a federal court. Moreover, in Hicks v. Miranda (1975), the current Court ruled that even if a

federal plaintiff wins the race to the courthouse and seeks federal judicial review prior to the initiation of state judicial proceedings against him, the state may nevertheless oust the federal courts by filing a proceeding even after the federal action is filed.

The net result of expanding the law of standing, narrowing the cause of action granted by the Civil Rights Act of 1871, and pyramiding abstention and comity into a disguised exhaustion requirement has been the creation of a jurisdictional maze which must be run in order to gain federal review of federal constitutional questions--a far cry from the simple, direct, and effective remedy intended by Congress in 1871. Unless Congress reasserts

its will, the current Court bids fair to repeal 42 USC §1983 by judicial fiat.

"In Praise of Simplicity", Irving Younger, A. B. A. J., May, 1976, p. 632

Practitioners of other disciplines know that simplicity is the mark of the master. But lawyers and judges violate the basic standards of simplicity and create needless confusion. Why not pledge adherence to the virtues of lucidity, candor, aesthetics, efficacy, and elegance?

I write in praise of a virtue--an intellectual virtue called simplicity.

It has long been understood by practitioners of disciplines other than the law that simplicity marks the master. Simplicity walks hand in

hand with high seriousness, not as a child better left behind, but as the very herald of large intention and great accomplishment.

How stands simplicity with us, the lawyers and judges? Not well, I fear. Walk through a law library and observe the shelves bulging with treatises, statutes, law reviews, regulations, digests, and case reports. Whatever its other charms and virtues, the law is hardly simple.

Worse, the law has made of simplicity a vice, the shameful badge of a mind too lazy or too weak to be admirably complicated. Who doesn't recall a professor at law school saying, "Really, that won't do, it's just too simple"? Or an appellate court saying, "The judge below apparently failed to grasp the complexity of the problem"? Or a judge saying to a lawyer, "Counselor, isn't your argument far too simple?" If lawyers, judges, legislators, and law professors were only brave enough to be simple, the law would be improved in five different ways.

Lucidity is an Essential

First, lucidity. Much of what lawyers and judges say is incomprehensible. Here is an example drawn from a recent issue of a leading law review. One of our most distinguished professors writes an article about entrapment, from which I quote a footnote: "However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what

might constitute appropriate police conduct." What does this mean" One can discover the author's through only be shoveling away the rubbish of complexity, and that is an undesirable state of affairs. A legal system, like any system of thought, should be clear. Lawyers and judges have an obligation to the public to speak lucidly about the law, to practice simplicity of language.

Candor Should Have a Place

Second, candor. Lawyers and judges should call things by their right name and state the real reasons for what they do. Only then will it be possible to engage in intelligent analysis and criticism, exposing and correcting error, eliminating irrationality, and transmitting to our successors a body

of law better and more coherent than the one we inherited. Yet many of us have fallen into a habit that dishonors candor. Things are not called by their right name but by elaborate wrong names. Decisions are not explained as what they are but as something else, easier and always more complicated than the truth.

Here is one example from a recent Supreme Court decision. In Warth v. Seldin, 422 U.S. 490 (1975), various petitioners sued the town of Penfield, a suburb of Rochester, New York, claiming that its zoning ordinance unlawfully operated to exclude persons of low and moderate income from living there. The Supreme Court dismisesed for lack of standing. Read the majority opinion and ask yourself

whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormously sensitive issues of race and economic class the Court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law of standing.

But wouldn't it have been better for the Court to say straight out that some issues can be decided only when the time is right and that the time was not right for the issues in this case? The simple approach serves where the disingenuous fails. Candor is appreciated in judicial opinions, as elsewhere.

Aesthetics and the Internal Revenue Code

Third, aesthetics. Beauty may exist in

a legal system as well as in a salt-cellar by Cellini. We should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute. Here is Section2-302(1) of the Uniform Commercial Code. It says simply that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result." That section is a thing of beauty.

Contrast it with the Internal Revenue Code. The aesthetic pleasure we take in our profession would be vastly increased were some federal judge

one fine morning to announce the following opinion (which I freely give to any judge who wishes to use it):

"This is a class action in which the plaintiff-taxpayer, on behalf of himself and all others similarly situated (which includes, I suppose, roughly 100 per cent of the population of the United States), sues for a judgment declaring the Internal Revenue Code unconstitutional. His argument is (1) that he does not understand it, (2) that no one can understand it, and hence (3) that it is invalid. The theory is novel, to be sure, but not for that reason necessarily wrong.

"Let us examine the code.

"Item. I doubt that the ordinary citizen can grasp the meaning of a

sentence more than fifty words long. The code contains sentences of 385 words (Section 6651(a)), of 379 words (Section 179(b)(1)(A)), and of 506 words (Section 7701(a)(19)).

"Item. Apart from mere length, I doubt that the ordinary citizen can grasp the meaning of a sentence which does not run more or less in a straight line from beginning to middle to end. What then is he to make of the last sentence of Section 509(a): 'For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in Section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in Section 501(c)(3)'?

"Item. One of the great achievements of our technological society is an arithmetic based on units of ten, thus permitting the easy manipulation of decimals. Yet the code fixes the accumulated earnings credit for certain groups of commonly controlled corporations at $83,333 for 1970 and $66,667 for 1971. It fixes the multiple surtax exemption at $20,833 for 1970 and $16,667 for 1971. It fixes the retirement income credit for years before 1969 at 15 per cent of $1,524.

"Item. A statute should be at least moderately straight forward. The code, however, sets up no less than fourteen different categories of charitable foundation subject to thirty-four different benefits and burdens, for a

total of 476 separate combinations.

"I do not wish to expand this opinion unduly, and so, for additional illustrations, I refer interested persons to any page of the Internal Revenue Code selected at random.

"The due process clause means many things. One of them, assuredly, is that the enactments of Congress, whatever their subject matter, be comprehensible to a citizen of average intelligence upon the application of reasonable diligence. I find that the Internal Revenue Code does not meet that standard.

"This may be the first case holding a statute void for rampant complexity. I hope it will not be the last. The Internal Revenue Code is declared unconstitutional under the due pro-

cess clause."

Law Needs Efficacy

Fourth, efficacy. Much of the law would work better were it simpler, and here is a sketch of the reason why.

There are two kinds of legal rule. One speaks primarily to lawyers. For example, the rule against perpetuities governs a lawyer sitting at his desk calmly drafting a will or trust indenture. It tells him what he may do and what not; but it affects the conduct of lay persons only from a distance, through its effect on the conduct of lawyers.

The other kind of rule speaks primarily to lay persons, telling them directly what they may do in their own lives. Mapp v. Ohio, 367 U.S.

643 (1961), is an example of this. It excludes in a criminal case evidence obtained by policemen in violation of the Fourth Amendment rights of the defendant. At first glance, this might seem a rule of the first kind, telling lawyers and judges what evidence is admissible or inadmissible at trial. But really it is a rule of the second kind. Assuming that the purpose of the rule is deterrence--to deprive law enforcement officers of the advantage of illegal searches and seizures and hence to deter them from committing illegal searches and seizures--we see that the rule's primary concern is to regulate the conduct of policemen on the street, not of lawyers and judges in the courtroom. Then shouldn't the rule by sim-

ple? If a policeman can't understand it or with certainty apply it in the hectic circumstances of an arrest, he will ignore it--not out of malice, but because it's human nature to ignore the inexplicable. And when the policeman ignores the rule, constitutional violations will occur.

Now look at the exclusionary rule and see how it measures up. The rule excludes illegally obtained evidence. But when is evidence illegally obtained? That is the real question, and to it, as we all know, the Supreme Court has given answers so numerous, so inconsistent, and so complicated that no lawyer and certainly no policeman can understand them. Take Collidge v. New Hampshire, 403 U.S. 443 (1971), a case involving run-of-

the-mill police conduct. The nine justices produced five opinions and a proliferation of explanations that make it impossible to state the holding of the case. With search-and-seizure law at such a pass, can we say that the exclusionary rule deters? It can't be understood. Therefore, it can't deter. Yet we want it to deter.

Then we must change the rule so that it works, and the way to change it is to make it simple. Instead of a tangle of exceptions, qualifications, exceptions to the qualifications, and qualifications to the exceptions, we need a rule something like this: No search is good unless supported by a search warrant; no arrest is good unless supported by an arrest warrant; only when there is insufficient time

to secure one will the requirement of a warrant be excused; when the requirement of a warrant is excused, the test of legality is the policeman's good faith. That, I submit, is a better rule than the rat's nest the Supreme Court has given us. Policemen will comply with it, and it's the job of a moment for a judge to apply it. The source of these benefits, note, is simplicity. A simple rule--at least one of the second kind, speaking primarily to nonlawyers--is more effective than a complicated rule. It simply works better.

Is There No Place for Elegance?

Fifth, elegance. Six and a half centuries ago, William of Occam wrote, "Pluralites non est ponenda sine necessitate." We know this as Occam's

Razor: given two ways of saying or doing or explaining something, one simpler than the other, always choose the simpler. This is an axiom of all intellectual work. The simple is more likely than the complex to be "true", and if "truth" is too complex a measure, then put it that the simple is more elegant than the complex.

For example, the keystone rule in the law of evidence is the rule against hearsay. Hearsay is not admissible--with exceptions, of course. In the Federal Rules of Evidence, there are twenty-seven specific exceptions and a catch-all, essentially for any other hearsay as good as that which the rules specifically make admissible. That's complicated, and because it's complicated, it's inelegant. Why

not reformulate the rule to say that hearsay is admissible unless the trial judge in his or her sound discretion thinks it fair to exclude it. That's the rule judges apply most of the time anyway. It's as much as any appellate court can do with hearsay. And it turns a clumsy contraption of exception piled upon exception into an object of plain and simple elegance.

Let's Recognize the Virtue of Simplicity

Simplicity is a virtue good in itself, as artists and scientists long have known. It would make our craft and mystery more lucid, candid, beautiful, effective, and elegant. I want simplicity for the law because I love the law, and if this praise seems overfond and foolish, call it lover's

folly and be patient with me for my love's sake.